IPREME COURT. U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1328

BETTY LEVIN, ET AL.,

Petitioners,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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April 26, 1969

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Justices of the Supreme Court of the United States:

Betty Levin, Jane Harris, and Nathan Stutch petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit reversing the judgment of the United States District Court for the Eastern District of Missouri.

Opinions Below

The opinion of the District Court is reported at 279 F. Supp. 525, and is reprinted as Appendix A hereto and at R.* 309. The opinion of the Court of Appeals is not yet reported, and is printed as Appendix B hereto.

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* "R." signifies the one-volume, 350-page printed Record in the Court of Appeals (Nos. 19,250-19,253), which is part of the certified record in this proceeding.

Jurisdiction

The Judgment of the Court of Appeals was entered on March 7, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), forbids the allowance of plaintiffs' counsel fees against a corporation that benefits from stockholder suits, because the value of the benefits can not be precisely measured, because no new fund is created, or because the plaintiff stockholders also benefit.

Statement of the Case

Two years ago, this Court unanimously reversed the judgment of the Court of Appeals for the Eighth Circuit (MEHAFFY, VAN OOSTERHOUT, and BLACKMUN, *JJ.*) and held these petitioners entitled to a class vote against a corporate scheme that would have forced them to take "four rabbits for one horse", as this Court put it. At the oral argument, Mr. Justice Douglas called the scheme "one of the most notorious pieces of predatory finance I have seen" (R. 226). *Betty Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162, 169 (1967) (R. 103, 110).

On remand to the District Court—which had initially upheld the class vote ultimately confirmed by this Court—the District Court awarded petitioners' counsel fees and expenses to be paid by the corporation.

Now the same Court of Appeals (MEHAFFY, *J.*, VAN OOSTERHOUT, *Ch.J.*, and HEANEY, *J.*) has reversed the award of attorneys' fees and expenses. These petitioners' attorneys ("Levin's attorneys") have not been paid for their services in this case.

The litigation began in 1963, when the respondent, Missouri Pacific Railroad Company ("MoPac"), unveiled a so-called Plan of Consolidation. The Plan provided for exchanges of stock that would have stripped MoPac's 39,731 Class B shares of $200,000,000 of their then equity and 98% of their future equity and earnings, and handed those values and rights over to MoPac's controlling stockholders, who own the 1,849,576 Class A shares. MoPac filed the Plan with the ICC, and stated in its application that it was about to submit the Plan for stockholder approval by a collective vote, rather than a separate class vote. Betty Levin and other Class B stockholders immediately brought derivative and representative actions to enjoin the Plan and the proposed collective vote as a violation of the class voting provisions of MoPac's charter and applicable law.

The District Court held that class voting was required. 233 F. Supp. 747. MoPac and its defendant directors thereupon urged the Court of Appeals to entertain an interlocutory appeal because of the critical importance to MoPac of a final decision on the voting rights question. The Court of Appeals accepted the appeal and unanimously reversed, holding that class voting was not required, and that the ICC should proceed with hearings on the Plan. 359 F.2d 106 (R. 77). The plaintiffs petitioned this Court for certiorari, which was granted, 385 U.S. 814 (1966). This Court unanimously reversed the Court of Appeals, and held, as had the District Court, that class voting was required by MoPac's charter, the Interstate Commerce Act, and Missouri law. Moreover, said this Court, "[e]ffective judicial administration" required that the case not be remanded to the Court of Appeals, but rather to the District Court. *Betty Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162, 169, 170 (1967) (R. 103, 110, 112).

As a result of this Court's final adjudication of the voting rights, MoPac abandoned its Plan and withdrew it

from consideration by the ICC. The litigation was then terminated, except for consideration by the District Court of applications for plaintiffs' expenses and counsel fees.

After a full hearing, at which expert testimony and other evidence was adduced by the plaintiffs and no contrary or other evidence was submitted by MoPac, the District Court awarded fees to plaintiffs' attorneys. The District Court (Meredith, J.), who was intimately familiar with all the proceedings in this litigation from its inception, found that "MoPac derived sufficient benefit from the declaratory judgment entered in this case to support charging attorneys' fees and expenses against it", and concluded that "dominating reasons of justice" required that result. The District Court determined as reasonable, and ordered MoPac to pay to the plaintiffs' attorneys, a total of $548,161 in fees and $41,926.18 in expenses. Of the total, the court awarded to Levin's attorneys—who had rendered their services "on a fee basis wholly contingent on both plaintiff's success and on the allowance of fees being awarded by this [District] Court"—a fee of $175,000 and their expenses of $12,504.85. 279 F. Supp. 525, 529, 530, 532 (*infra* 7a, 9a, 12a, 14a).

MoPac again appealed, and again the Court of Appeals reversed, disallowing all the attorneys' fees and expenses awarded by the District Court. This punitive treatment of the plaintiffs' attorneys is compelled, said the Court of Appeals, by the recent decision of this Court in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967).

Reasons for Granting the Writ

1. The Court of Appeals misconstrued and misapplied applicable decisions of this Court, and did so in a way that will cripple the role of shareholders' suits against the schemes of insiders who are bent on betraying the interests of their company and its public stockholders in order to enrich themselves.

The Court of Appeals based its reversal of the fee allowance squarely on *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), which, said the Court of Appeals, "controls the issue here." (*Infra* 23a) We submit that the Court of Appeals misconstrued and misapplied *Fleischmann.*

Fleischmann was a Lanham Act trademark infringement case. This Court held that attorneys' fees are not allowable in such a case, because the Lanham Act, which created the cause of action, also expressly enumerates the available remedies; and Congress several times declined to amend the Act to provide for attorneys' fees. The Court, in a review of the matter of allowing attorneys' fees to successful litigants, noted the general American practice against such allowances. However, the Court then listed some of the exceptions "sanctioned by this Court when overriding considerations of justice seemed to compel such a result." 386 U.S. at 718. The Court also approved the principle "that the general equity power 'to do equity in a particular situation' supported an award of attorney's fees". 386 U.S. at 719.

The District Court in this case properly relied on *Fleischmann* in requiring MoPac to pay the plaintiffs' attorneys' fees, because MoPac benefited from the final judgment. As the District Court found, the final judicial declaration of the voting rights is a benefit to MoPac

> "of sufficient magnitude and importance * * * that in order to do justice, plaintiffs' attorneys should

> be allowed a fee to be paid by MoPac." (*Infra* 6a-7a, 9a)

The District Court observed that MoPac itself had stated to the Court of Appeals that a final determination of the voting rights was of "great importance" to MoPac "because it would apply to any plan of merger or consolidation." (*Infra* 6a) Indeed, MoPac repeatedly told this Court that the answer to the voting rights question in this case would apply to "any and all rail consolidations which MoPac may ever seek to effect".*

Another important benefit that MoPac sought from this litigation—and got—was that of being spared the greater expense of ICC and subsequent proceedings on the Plan itself. MoPac urged the Court of Appeals to accept MoPac's interlocutory appeal on the voting rights question because, said MoPac,

> "a final holding on the question of class voting rights might end litigation which will be long, time-consuming and expensive to the parties, and burdensome to the ICC and the Courts." (R. 74)

MoPac was correct. Because the plaintiffs petitioned this Court for writs of certiorari to review the decision of the Court of Appeals on the voting rights question, and this Court reversed, MoPac was spared any further waste of its assets in such lengthy and expensive litigation before the ICC and reviewing courts.**

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* R. 238n.* (from Brief for Respondent MoPac in *Betty Levin* v. *Mississippi River Fuel Corp., et. al.*, October Term, 1966, Nos. 352 & 359, at 94; *see also* pp. 13 and 24).

** Carroll J. Donohue, Esq., the expert witness for Levin's attorneys, testified "that this action really brought into focus and resolved a proceeding or a series of proceedings which might have extended over, many, many years, . . . at vast direct expense by way of counsel fees, etc. . . . I felt that that matter was resolved by this action and resolved quickly." (R. 289)

MoPac realized still other benefits. The final judicial declaration restrained MoPac from following an illegal course of action (to wit, violating its charter and federal and state statutes), and caused MoPac to abandon a predatory scheme that might have cost more to undo than to prevent. Also, the judicial declaration preserved the integrity of MoPac's 1955 plan of bankruptcy reorganization, which fixed the proper relative positions of the stockholders. (R. 236-38, 253-54, 289-90.)

When a corporation derives such substantial benefits from litigation conducted by its stockholders,

> "justice calls for the practical recognition of their contribution by providing that the petitioners' reasonable counsel fees and expenses be paid by the corporation which, while resistant to their demands, has benefited by their contumacy." *

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* *United Funds, Inc.* v. *Carter Products, Inc.*, CCH Fed. Sec. L. Rep. (1961-64 Decisions) ¶ 91,316 at p. 94,362 (Md. Cir. Ct. 1964) (preventing de-listing of stock).

Benefits similar to those derived by MoPac are frequently encountered in stockholders' suits, with the result that the benefited corporation is accordingly required to pay the stockholders' counsel fees. *See, e.g., Abrams* v. *Textile Realty Co.*, 97 N.Y.S. 2d 492, 495, 496 (Sup. Ct. N.Y. Co. 1949) (corporation restrained from violating its plan of reorganization; "such restraint is deemed in law to be protection of and beneficial to the corporation"); *Jesser* v. *Mayfair Hotel, Inc.*, 360 S.W. 2d 652, 660, 661 (Mo. 1962) (proposed sale of minority shares held in voting trust enjoined as illegal, thereby preventing "the doing of a wrongful act . . . which might easily have cost more to undo than to prevent"; "construction of the trust agreement and the prevention of the unauthorized sale was a substantial benefit to the Mayfair corporation"); *Berger* v. *Amana Society*, 253 Ia. 378, 387, 111 N.W. 2d 753, 758 (1962); 257 Ia. 956, 963, 135 N.W. 2d 618, 622 (1965) (fundamental attributes of capital stock structure preserved by nullifying an illegal shareholder vote that would have shifted control of the corporation to another class of shareholders; "an adjudication which requires a corporation to honor an important long-standing contractural obligation to its shareholders is a benefit to the corpora-

We respectfully submit that the "overriding considerations of justice" present in this case warrant the allowance of attorneys' fees within the principles enunciated by this Court in *Fleischmann*.

The Court of Appeals acknowledged that this Court's final decision on voting rights "authoritatively advised" MoPac of the stockholder voting requirements for a railroad consolidation; that such "final adjudication . . . is a benefit to" MoPac; and that such benefit was "the inescapable result of the litigation" (*infra* 20a, 25a). After finding such benefits, the Court of Appeals could reasonably be expected to have heeded the "overriding considerations of justice" and affirmed the allowance of attorneys' fees. But by some curious perversion of logic and construction, the Court of Appeals turned *Fleischmann* on its head and ruled that it compelled a denial of the fees.

The Court of Appeals extenuated its denial of fees on the following grounds, in which, we submit, the Court of Appeals clearly erred:

(1) The Court of Appeals said that no monetary value was placed upon the benefit to MoPac (*infra* 20a, 22a). There is nothing in *Fleischmann* that even remotely requires a specific monetary determination as a condition for the allowance of fees. The existence and nature of the benefit are the crucial conditions. As a result of this litigation, MoPac has been afforded authoritative guidelines for the future. MoPac itself admitted that a decision

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tion itself as well as to the shareholders."); *Allen* v. *Chase National Bank*, 180 Misc. 259, 40 N.Y.S. 2d 492 (Sup. Ct. Bx. Co. 1943) (voting trust terminated and voting rights restored to the stockholders); *Bosch* v. *Meeker Co-op. Light & Power Ass'n*, 257 Minn. 362, 101 N.W. 2d 423 (1960) (purported election of directors, and proposed amendment of by-laws, determined to be illegal); *Matter of Caplan* v. *Lionel Corp.*, 18 N.Y. 2d 945, 223 N.E. 2d 568 (1966) (savings effected by preventing corporate purchases at excessive price).

on the voting rights was of "great importance" to the corporation. "Great importance" is not diminished in any way by the absence of a specific dollar sign. Courts have expressly held that plaintiffs' fees may be awarded although the value of the corporate benefits "cannot be directly measured in dollars and cents."*

Moreover, the novel rule announced by the Court of Appeals would generate enormous mischief. It would deny fees in shareholder suits that prevent wrongful acts before they can inflict serious injury on the corporation, merely because the precise extent of the harm averted or the precise dollar savings to the corporation can not be measured. Yet not infrequently, those suits are directed at the most flagrant abuses, and particularly call for judicial relief. This is such a case: MoPac was saved from the immeasurable expense of ICC and subsequent proceedings that MoPac itself acknowledged would have been expensive and burdensome; MoPac was saved from "the doing of a wrongful act . . . which might easily have cost more to undo than to prevent" (*Jesser* v. *Mayfair Hotel, Inc., supra* p. 7 n.); and MoPac's charter and capital structure were protected against destruction by predatory insiders. Yet it is difficult, or impossible, to measure the value of those benefits in specific dollars and cents.

Must the stockholders wait until the harm has been perpetrated and the dollar sign put on the damage before they bring their action? The decision of the Court of Appeals will hardly encourage fidelity to high standards of corporate behavior.

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* *Saks* v. *Gamble*, 38 Del. Ch. 504, 510, 154 A. 2d 767, 770 (1958) (elimination of doubts as to corporation's ownership of certain stock). Accord: *Matter of Caplan* v. *Lionel Corp., supra* p. 8 n., 18 N.Y. 2d at 946-47, 223 N.E. 2d at 569 (setting aside illegal election of directors and preventing certain corporate purchases at excessive price, which "accomplishment was not measurable in mathematical terms and no specific fund had been created").

(2) Said the Court of Appeals: "No new fund was created for the corporation nor were any assets of the corporation preserved" (*infra* 25a). Here again, the Court of Appeals departed from *Fleischmann.*

As to a new fund: There is nothing in *Fleischmann* to suggest that the creation of a new fund is a requirement for the allowance of attorneys' fees. Indeed, the contrary is indicated by *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939), which this Court discussed with approval in *Fleischmann.*. Attorneys' fees are frequently allowed in stockholders suits that do not create a fund. (See the cases cited *supra* pp. 7-8 n.)

As for preserving corporate assets: The record contains MoPac's own acknowledgement that the final holding on the class voting rights spared MoPac any further waste of corporate assets on expensive litigation before the ICC and reviewing courts (*supra* p. 6 n.).

It is ironical that the Court of Appeals justified its denial of fees on the claimed ground that no corporate assets were preserved. It is indisputable that protracted litigation and waste of corporate assets would have ensued if the plaintiffs had accepted the Court of Appeals decision relegating MoPac's Plan to the ICC. Instead, the plaintiffs, seeking *inter alia* to preserve MoPac's assets, petitioned this Court for writs of certiorari to review the Court of Appeals' solicitude for a scheme that Mr. Justice Black, at the oral argument, called "so unfair one might not even be willing to trust the Interstate Commerce Commission to decide it" (R. 238 n.**).

(3) The Court of Appeals, while conceding that MoPac benefited from the litigation, asserted that the benefits to the Class B "far outweigh" the benefits to MoPac (*infra* 22a). That assertion is not only irrelevant, but also without any basis in fact. The court itself claimed MoPac's benefits to have been unweighable.

Comparative measurements of benefits are irrelevant. The significant test is whether benefits were conferred on MoPac. Since they were, the District Court properly awarded fees to be paid by MoPac.*

Those benefits to MoPac are in no way diminished by whatever benefits also were derived by the Class B. The very essence of stockholders' suits is the preservation and protection of corporate interests designed for the benefit of the stockholders. Nothing whatever in *Fleischmann, Sprague,* or any other authority cited by the Court of Appeals lends any support to its curious and novel doctrine that a defendant corporation, having derived substantial benefits from stockholders' suits, may nevertheless escape payment of plaintiffs' counsel fees just because the plaintiffs also derived benefits.**

The Court of Appeals recited that MoPac's Plan would have taken away $200,000,000 in equity from the Class B, and that the market value of the Class B stock accordingly

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* The benefits conferred on MoPac were precisely the benefits sought for MoPac by the derivative Third Count in the Levin complaint and the Harris complaint, which alleged, on behalf of MoPac, (1) that MoPac was being made to violate its own stockholder class voting requirements, and (2) that MoPac was wasting its assets by promoting the Plan. The relief requested was a declaration of the class voting rights, and an injunction against the Plan. (R. 53-55; Record in Court of Appeals on prior appeal (No. 17,836) (which is part of the certified record in this proceeding) at 62-64). This Court declared the class voting rights as requested, whereupon MoPac dropped the Plan.

** On the contrary, where the litigation directly benefits both the corporation and some or all of its stockholders, it is the corporation that is required to pay the stockholders' counsel fees. *See, e.g., Berger* v. *Amana Society,* p. 7 n., where the plaintiff stockholders were benefited by the judgment preventing the issuance of shares of another class; *Jesser* v. *Mayfair Hotel, Inc., id.,* where the plaintiff minority stockholders were benefited by the judgment preventing a sale of their stock by the majority's representative; *Abrams* v. *Textile Realty Co., id.,* 97 N.Y.S. 2d at 496.

fell when the Court of Appeals decided in favor of MoPac, and then rose when this Court reversed (*infra* 21a). But the Court of Appeals completely ignored the meaning of the figures it recited: that the Class B stockholders, by stopping MoPac's illegal and predatory conduct, gained nothing new for themselves, but simply preserved the rights and values that had been settled and guaranteed to them ten years earlier by the ICC and the same federal courts in approving MoPac's plan of bankruptcy reorganization. Yet the Court of Appeals recited its essay in arithmetic ostensibly to support its conclusion that *Fleischmann* and *Sprague* compel the denial of plaintiffs' counsel fees. Thus, while the predatory controlling stockholders availed themselves of corporate assets to finance and defend their scheme to enrich themselves, the Court of Appeals denied compensation to the attorneys for minority stockholders who expended enormous efforts to thwart the banditry and save the corporation from further spoliation. Instead of imposing restraints on predatory conduct, the Court of Appeals has made it easier.*

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* The Court of Appeals did not even mention the fact that the actual burden of *all* attorneys' fees paid by MoPac—including the fees paid by MoPac to its own attorneys in this case—is borne by the Class B stockholders in any event, because the fees are paid from MoPac's residual or retained earnings, to which only the Class B stockholders are entitled. As this Court recognized, the Class B is entitled to all of the earnings and equity in excess of the Class A preferences. 386 U.S. at 165, 169 (R. 105, 109). MoPac has a total stockholders' equity of about $500,000,000, retained earnings of $300,000,000, and average net earnings of $27,000,000 a year for the past five years. The Class A preferences are permanently limited to an equity of $185,000,000 and dividends not to exceed $9,250,000 a year. Thus the total fees and expenses of $590,087.18 allowed by the District Court could not conceivably impair the Class A preferences. Payment of fees by MoPac in effect apportions the burden ratably among the 1,200 Class B shareholders scattered throughout the nation.

In its determination to deny fees to the plaintiffs' attorneys, the Court of Appeals led itself into sheer speculation and outright misreading of the record: The Court of Appeals asserted that "[n]othing appears in the record" to indicate that the litigation costs were reduced "by plaintiffs bringing the declaratory judgment litigation rather than having such litigation commenced by Mo-Pac or by having it resolved in the Interstate Commerce Commission proceedings." (*infra* 22a).

If the Court of Appeals wished to indulge in speculation as to how litigation costs could have been reduced, the most obvious approach would have involved no promulgation of the predatory scheme in the first place. The fact is, however, that MoPac chose not to commence a declaratory judgment action, but rather to develop a predatory scheme, file it with the ICC, and announce an imminent stockholders' vote on an illegal (non-class) basis. That reality, and not some hypothetical possibility, was the situation created by MoPac and confronting the plaintiffs. It was only the plaintiffs' prompt action that halted the waste of corporate assets loosed by MoPac's program. It was only after the plaintiffs had commenced suit to stop MoPac's scheme that MoPac's directors then told the District Court:

> "[W]e welcome the opportunity to get a ruling on this point . . . we all seem to want a decision one way or the other by the Courts as to what these voting rights are. . . ." (R. 229)

The emphasis by the Court of Appeals on procedures that MoPac might have pursued, but did not pursue, is no more relevant that what might have happened if MoPac had adopted a different plan or no plan at all. The fees awarded by the District Court are based not on what MoPac might have done, but on what the plaintiffs were required to do because of what MoPac's wrongdoing compelled them to do.

As for the Court of Appeals' statement that "[n]othing appears in the record" to indicate that the declaratory judgment litigation was less costly than ICC proceedings would have been: On the contrary, the record is replete with uncontroverted evidence that the plaintiffs' actions were less costly, and saved MoPac from the more expensive route that MoPac itself had started in the ICC. MoPac said so (*supra* p. 6); the expert witness for Levin's attorneys so testified (*supra* p. 6 n.); Levin's attorneys so testified (R. 238).

The Court of Appeals also speculated that "[i]t would be reasonable to suppose" that the ICC would have reached the voting issue early in the proceedings (*infra* 22a). Let us *arguendo* accept that supposition. Judicial review would have been pursued as it was in fact; but in addition there would have been the ICC expenses. Furthermore, if the plaintiffs had followed the directions of the Court of Appeals' prior decision, that would simply have triggered the "long, time-consuming and expensive" litigation before the ICC and reviewing courts. MoPac itself has recognized that all these wasteful steps have been obviated by the final declaratory judgment in the plaintiffs' suits.

Minority shareholder suits are often the only effective means of preventing illegal corporate manipulations and abuse by insiders and controlling stockholders. This Court has recognized that such suits

> "have played a rather important role in protecting shareholders of corporations from the designing schemes and wiles of insiders who are willing to betray their company's interests in order to enrich themselves." *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966).

If attorneys' fees could not be awarded in such suits that did not meet the novel restrictions imposed by the Court of Appeals, it is unlikely that many such suits would be

brought, no matter how serious the corporate abuse. The expense of prosecuting such actions, all the way to this Court if need be, will usually be prohibitive, especially where the defendant corporation and its controlling stockholders can, as in this litigation, draw on the vast financial resources of the corporation to oppose the prophylactic litigation.*

2. The Court of Appeals' unusual handling of this litigation calls once again for this Court to exercise its power of supervision.

When the Court of Appeals accepted MoPac's first appeal in this case, it employed a novel misconstruction of national policy and the Interstate Commerce Act, in order to reverse the District Court and to breathe new life into the most predatory scheme in the history of American railroad finance.

The second time MoPac turned to the Court of Appeals in this case, that court again conceived a novel doctrine—this time by misconstruing decisions of this Court, and ignoring all other authority—in order again to give comfort to the predatory insiders of MoPac, and to deprive the petitioners' attorneys of the fees awarded for their services in correcting the first errors of the Court of Appeals.

The pattern in this case is obvious enough. Moreover, the Court of Appeals has chosen this particular case in which to lay down novel restrictions on the power of federal

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* "[T]he record of litigated cases is prophylactic—a deterrent to future wrongdoing. Every successful suit duly rewarded encourages other suits to redress misconduct and by the same token discourages misconduct which would occasion suit. There can be no doubt that these derivative suits have materially raised the standards of fiduciary relationships and other economic behavior." Hornstein, "Legal Therapeutics: The 'Salvage Factor' in Counsel Fee Awards," 69 Harv. L. Rev. 658, 663 (1956).

judges to award fees. These restrictions will have a destructive impact on other shareholder suits to protect corporations and their stockholders from abuse by insiders. Once again, we ask this Court to correct the errors and injustice below.

The District Court, in arriving at its determination of the amount to allow Levin's attorneys, had before it a complete record of all relevant material.* Furthermore, the District Court was personally acquainted with the services rendered by the plaintiff's attorneys.** Since the District Court demonstrably did not abuse its discretion, its determination of the fees could not properly be disturbed by the Court of Appeals.

> *Trustees* v. *Greenough,* 105 U.S. 527, 537 (1881); *Transfer Mfg. & Equipment Co.* v. *Fruehauf Trailer Co.,* 295 F.2d 223, 233-34 (8th Cir. 1961).

This has been a six-year merry-go-round of expensive litigation, thanks in no small measure to the prior decision of the Court of Appeals, which revitalized MoPac's predatory scheme. "Effective judicial administration" once again requires that the case not be remanded to the Court of Appeals, but to the District Court, whose judgment should be affirmed.

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* *E.g.*, the nature and extent of the services rendered (R. 225-35, 284-92); the experience, skill, and resourcefulness of Levin's attorneys (R. 227, 239) and of opposing counsel (R. 239-40); the contingent nature of the retainer (R. 226); the benefits to MoPac (R. 236-38, 289-90); the prevailing rates of compensation (R. 283, 286); two expert opinions as to the amount of a reasonable fee (R. 287, 293, 301-02).

** "[C]ourts are themselves experts on the question of attorneys' fees and the judge who personally tries a case and is acquainted with all the issues involved is in a position to fix the amount of attorneys' fees without the aid of evidence." *Agnew* v. *Johnson,* 352 Mo. 222, 233, 176 S.W. 2d 489, 493 (1943).

CONCLUSION

The writ of certiorari should be granted, the judgment of the Court of Appeals below should be reversed, and the judgment of the District Court below should be affirmed.

Respectfully submitted,

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April 26, 1969

APPENDIX A

Opinion of District Court, Dated January 12, 1968, Reported at 279 F. Supp. 525

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI,

EASTERN DIVISION

No. 63 C 436 (2)

ROSE SLAYTON, et al.,

Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, et al.,

Defendants.

No. 64 C 48 (2)

ALLEGHANY CORPORATION, et al.,

Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, et al.,

Defendants.

No. 64 C 77 (2)

BETTY LEVIN,

Plaintiff,

vs.

MISSISSIPPI RIVER FUEL CORPORATION, et al.,

Defendants.

No. 64 C 340 (2)

JANE HARRIS and NATHAN STUTCH,

Plaintiffs,

vs.

MISSISSIPPI RIVER FUEL CORPORATION, et al.,

Defendants.

Appendix A

MEMORANDUM

(Filed in U. S. District Court January 12, 1968)

The Court has received applications from counsel for plaintiffs for attorneys' fees and expenses incurred in connection with Slayton, et al. v. Missouri Pacific Railroad, et al., No. 63 C 436 (2); Alleghany Corporation, et al. v. Mississippi River Fuel Corporation, et al., No. 64 C 48 (2); Levin v. Mississippi River Fuel Corporation, et al., No. 64 C 77 (2); and Harris, et al. v. Mississippi River Fuel Corporation, No. 64 C 340 (2).

Plaintiffs Slayton, et al., were represented by the law firm of Pomerantz, Levy, Haudek and Block of New York, and Ackert and Tompkins of St. Louis. Plaintiff Alleghany Corporation (hereinafter referred to as "Alleghany") was represented by the firms of Donovan, Leisure, Newton, and Irvine of New York, and Fordyce, Mayne, Hartman, Renard and Stribling of St. Louis. Plaintiffs Levin and Harris were represented by John Lowenthal of New York, Maxwell Brandwen of Szold, Brandwen, Meyers and Altman of New York, Roberts Elam of St. Louis, and Alvin Levin of Sherin and Lodgen of Boston.

The suits giving rise to these applications were brought as class actions by plaintiffs as representatives of holders of Class B stock in the Missouri Pacific Railroad Company (hereinafter referred to as "MoPac").

In December 1963, the Board of Directors of MoPac approved a proposed plan of consolidation of MoPac and the Texas and Pacific Railway Company into a new corporation to be known as The Texas and Missouri Pacific Railroad Company. In its application to the Interstate Commerce Commission for authorization of the proposed consolidation, MoPac stated that the plan would be sub-

mitted to its stockholders for approval on the basis of a collective, rather than a class, vote. At this time there were two classes of MoPac stock totalling 1,896,008 shares. Of these, 1,856,277 shares were Class A stock, having a limited annual return of $5.00 per share and a fixed value on liquidation of $100 per share, and 39,731 shares were Class B shares, whose holders were entitled to receive such dividends as the Board of Directors declared, without restriction as to amount, and to receive, on liquidation, all the assets of MoPac remaining after satisfaction of all the claims of Class A shareholders.

Over one-half of the Class A stock was owned by Mississippi River Fuel Corporation (hereinafter referred to as "Mississippi").

As of September 30, 1963, the consolidated net assets of MoPac were $394,721,242. The equity of the Class A stock was $100 per share, or $184,957,600, which constituted forty-seven percent of the total. The equity of the Blass B stock was $5,280 per share, or $209,763,642, which constituted fifty-three percent of the total.

Under the proposed plan of consolidation, each share of MoPac stock, regardless of class, would have been exchanged for four shares $25.00 par value common stock of the consolidated company, thereby changing the relative participation in equity of the Class A and Class B shareholders from forty-seven percent and fifty-three percent, respectively, to ninety-eight percent and two percent, respectively, and destroying the Class B shareholders' constantly accruing percentage increase of the total equity by fixing their equity participation in the corporation enterprise permanently at two percent. (See Slayton v. MoPac, 233 F. Supp. 747.)

Each plaintiff brought suit to compel class voting on the consolidation plan, thereby requiring a majority of

each class to approve of it and asked for other relief. The parties agreed to limited consolidation on a motion to dismiss and the decision in the first instance went solely to the issue of voting rights of the classes of stock.

On July 13, 1964, this Court upheld the separate class voting rights of the MoPac shareholders under the corporation's charter and the applicable federal and state law, and denied defendants' motions to dismiss. 233 F. Supp. 747. Thereafter, defendants moved for certification for an interlocutory appeal under 28 U. S. C. § 1292 (b). This Court granted the motion, and the Court of Appeals allowed the appeal. On April 19, 1966, the Court of Appeals reversed the District Court, holding that class voting was not required. 359 F. 2d 106.

Plaintiffs petitioned the Supreme Court of the United States for writs of certiorari to review the judgment of the Court of Appeals, which writs were granted on October 10, 1966. Separate briefs and reply briefs were filed by plaintiffs Levin and Alleghany and oral arguments were had before the Supreme Court on January 19, 1967.

The Supreme Court reversed the Court of Appeals, holding that class voting was required by MoPac's charter and applicable federal and Missouri law, and remanded to this Court for further proceedings consistent with the Supreme Court's opinion at 386 U. S. 162.

In March 1967, MoPac and The Texas and Pacific Railway abandoned the consolidation plan and withdrew it from consideration by the Interstate Commerce Commission. After various conferences had been held and proposals for terminating the litigation had been made, this Court entered a declaratory judgment on June 30, 1967, in all four actions, upholding class voting rights of MoPac shareholders. At the same time, the Court decreed that the suits were properly maintained as class actions, and set July 31, 1967, as the date for a hearing to deter-

mine whether to dismiss the actions without prejudice and with costs payable by defendants to plaintiffs, and reserving jurisdiction to entertain applications for plaintiffs' expenses and counsel fees. At that hearing, this Court disposed of all issues save those raised by plaintiffs' application for expenses and counsel fees.

The law firms of Donovan, Leisure, Newton and Irvine, and Fordyce, Mayne, Hartman, Renard and Stribling, seek counsel fees and reimbursement of expenses only from MoPac. Pomerantz, Levy, Haudek and Block and their St. Louis counsel, Ackert and Tompkins, seek counsel fees and reimbursement of expenses primarily from MoPac, and secondarily from Mississippi, on the grounds that the latter is guilty of "inequitable conduct". Messrs. Lowenthal, Brandwen, Levin and Elan seek counsel fees and reimbursement of expenses from MoPac with a plea that Mississippi and defendant Directors of MoPac be required to participate in the liability therefor.

Class and derivative suits are expressly permitted by Rule 23, Federal Rules of Civil Procedure, and the law is well settled that plaintiffs' successful prosecution of such class actions vests the Court with power to award counsel fees and expenses in appropriate circumstances. Trustees v. Greenough, 105 U. S. 527 (1882); Sprague v. Ticonic Bank, 307 U. S. 161 (1939); Jesser v. Mayfair Hotel, Inc., 360 S. W. 2d 652 (S. Ct. Mo. 1962); German Evangelical St. Marcus Cong. v. Archambault, 404 S. W. 2d 705 (S. Ct. Mo. 1966); Mercantile-Commerce Bank & Trust Co. v. Southeast Arkansas Levee Dist., 106 F. 2d 966 (8th Cir. 1939).

When a shareholder proceeds, at his own expense, to protect an interest common to other shareholders and of benefit to the corporation, he is entitled to reimbursement from the corporation which benefited from his efforts.

When a plaintiff proceeds strictly for his own advantage, the litigation is "private litigation" and he must pay his own counsel fees and expenses.

Defendants argue that plaintiffs' sole purpose in bringing suit was to enhance the value of their property, i. e., the Class B shares of stock, and that under these circumstances there is no lawful basis to assess counsel fees and expenses against MoPac, Mississippi or the Directors of MoPac. Plaintiffs argue that substantial benefits were conferred upon MoPac and all its shareholders because (1) there was a final adjudication of the voting rights of MoPac's two classes of stock in merger and consolidation, and (2) the consolidation plan, which would have been instituted by means of improper voting and which would have resulted in the corporation committing an *ultra vires* act detrimental to the corporation, was abandoned.

A judicial declaration of voting requirements for MoPac shareholders on merger and consolidation is a benefit to MoPac. In their Application for Permission to Take an Appeal From an Interlocutory Order, defendants stated that the question of voting requirements in mergers and consolidations is "a matter of great importance to both MoPac and to its stockholders" and Mississippi's briefs to the Court of Appeals stated that such a determination was important because it would apply to any plan of merger or consolidation.

The fact that the merits of this particular plan and the question of class voting might have been determined by the Interstate Commerce Commission does not detract from the benefit accruing to MoPac from having the determination made, ultimately, by the Supreme Court of the United States.

The case of Jesser v. Mayfair Hotel, Inc., supra, indicates that the benefit conferred is of sufficient magnitude

and importance to support an award of attorneys' fees. In Jesser, defendant hotel company's stock was placed in a voting trust pursuant to a reorganization decree. A majority of the voting trust certificates was held by defendants, a minority was held by a number of individuals, including plaintiffs. The voting trustees, as legal owners of the stock, proposed to sell the minority shares to a company associated with themselves, and plaintiffs succeeded in preventing the trustees from consummating the proposed sale by means of a successful class action for an injunction. The Supreme Court of Missouri found that

> "A trust beneficiary who prevents a wrongful disposition of trust assets renders a benefit to the trust estate as much as the one who recovers back property wrongfully disposed of."

and concluded that the preservation of the integrity of the voting scheme was a sufficient benefit to the voting trust to justify an award of counsel fees and expenses against defendant hotel company and the (voting) trust estate. The individual trustees were not, however, held personally liable for any part of these fees.

While the case at bar does not involve a voting trust, the principles of the Jesser case are applicable to the preservation of the voting scheme permitted by the corporate charter and the applicable state and federal laws. Based on such application, the Court finds that MoPac derived sufficient benefit from the declaratory judgment entered in this case to support charging attorneys' fees and expenses against it. [See also Berger v. Amana Society, 111 N. W. 2d 753 (1962), and 135 N. W. 2d 618 (Iowa, 1965), in which plaintiffs, as minority Class A shareholders, succeeded in invalidating a charter amendment which would have destroyed their redemption rights,

for which action the Supreme Court of Iowa allowed counsel fees on the grounds that plaintiffs' success was a "corporate benefit" and, therefore, compensable by the corporation.]

The defendants in this case point out that there has been no judicial determination by this Court, the Court of Appeals, or the Supreme Court, that the plan in question was unfair or that any fraud has been committed by Mississippi, the Directors of MoPac, or anyone else. Defendants further point out that the benefit, if any, derived from this lawsuit was to the "B" stockholders and not the MoPac as a corporation. They also point out that there is no showing in the record that Mississipi had anything to do with the drafting, adoption or promulgation of the proposed plan or that any of the Directors of MoPac had any personal interest in this matter or that the Directors acted in any way, except in good faith. Among other cases cited by defendants is Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967). This case holds that attorneys' fees are not allowable in a Lanham Act case, 15 U. S. C.; 1051-1127, where the statute does not provide for attorneys' fees and also points out that attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.

The Fleischmann Distilling Corp. case, supra, approves the principles set out in Sprague v. Ticonic Bank, supra. Sprague specifically holds at page 167:

> "And so, the circumstances under which the petitioner enforced the fiduciary obligation of the Ticonic Bank—the relation of its vindication to beneficiaries similarly situated but not actually before the court . . . and doubtless other considerations—must enter into the ultimate judgment of the

> District Court as to the fairness of making an award, . . . In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice."

The Court here is of the opinion that the instant case is an exceptional case and that in order to do justice, plaintiffs' attorneys should be allowed a fee to be paid by MoPac. While it is true the merits of the plan of consolidation have never been judicially passed on, it does not take any further inquiry than a reading of the balance sheet of MoPac, coupled with the plan, to determine its inherent unfairness to the B stockholders. The plan essentially would have taken from the B stockholders an equity in excess of $200,000,000 and given it to the A stockholders.

This is sufficient reason to award fees to the attorneys for the plaintiffs. This plan has now been abandoned. The voting rights and relative equities of A and B stockholders have been determined. The record before this Court is insufficient to make an award of fees against either the Directors of MoPac or Mississippi.

Having determined that plaintiffs' attorneys should be awarded attorneys' fees and expenses, and from whom these fees and expenses should be collected, the only issue remaining is what fees are reasonable in the circumstances of this case?

There is no dispute that in awarding counsel fees and expenses in action of this sort, the courts have discretion to make reasonable awards. [See, e.g., Murphy v. North American Light & Power Co., 33 F. Supp. 567 at 571 (S. D. N. Y. 1940); Smolowe v. Delendo Corp., 136 F. 2d 231 at 241 (2nd Cir. 1943), cert. den. 320 U. S. 751.] The factors to be included are:

> "the amount recovered for the corporation; the time fairly required to be spent on the case; the skill re-

quired and employed on the case with reference to the intricacy, novelty and complexity of issues; the difficulty encountered in unearthing the facts and the skill and resourcefulness of opposing counsel; the prevailing rate of compensation for those with the skill, experience and standing of the attorneys, accountants or others involved; the contingent nature of the fees, with the accompanying risk of wasting hours of work, overhead and expenses (for it is clearly established that compensation is awarded only in the event of success); and the benefits accruing to the public from suits such as this." Angoff v. Goldfine, 270 F. 2d 185 at 189 (1st Cir. 1959).

The services rendered to Alleghany by Donovan, Leisure, Newton and Irvine, are outlined in detail in their verified application for a fee. The request by that firm is based on the number of hours which the firm's partners and associates devoted to this case. Time sheets indicate that partners spent a total of 1,893½ hours and associates spent a total of 1,239¼, or total time of 3,132¾ hours. Affidavits and testimony before the Court show that the customary charge in New York for handling litigation of the importance and difficulty of this case is $75.00 per hour for partners' time and $35.00 per hour for associates' time. Thus, the total charge for partners' time is $142,012, and for associates' time is $43,374, which together total $185,386.

The expenses incurred by this firm in connection with this litigation are supported by vouchers and receipts in nearly every instance. These expenses total $25,838.56, a large portion of which is printing expense. These fees and expenses have either been partially paid or agreed to by Alleghany, the client, regardless of the outcome of this case and this, in the opinion of the Court, is the greatest test of all as to them being reasonable.

Appendix A

The services rendered to Alleghany by the law firm of Fordyce, Mayne, Hartman, Renard and Stribling in this litigation are set forth in detail. The requested fee is based on 340 hours which partners of the firm devoted to this case, and the 35 hours which associates of the firm devoted to the case. In view of the fact that primary responsibility for the litigation rested with Donovan, Leisure, Newton and Irvine, applicant Fordyce, Mayne, Hartman, Renard and Stribling state that the reasonable value of its services is $35.00 per hour for partners' time and $25.00 per hour for associates' time, for a total of $12,775.00. In addition, this applicant seeks reimbursement for itemized expenses totalling $739.53. These fees have also been partially paid or agreed to by Alleghany, regardless of the outcome of this suit.

The Court finds that these fees and expenses are reasonable, and accordingly, an order will be entered allowing applicant Fordyce, Mayne, Hartman, Renard and Stribling the sum of $13,514.53.

Whatever fees and expenses paid by Alleghany to its attorneys and recovered in this suit, will be refunded to Alleghany.

The services rendered to plaintiffs in this litigation by John Lowenthal, and the firms associated with him, were rendered on a fee basis wholly contingent both on plaintiffs' success and on the allowance of fees being awarded by this Court.

This set of plaintiffs' attorneys point out that defendants employed seven teams of attorneys to oppose these suits. These attorneys for defendants were:

(1) Bryan, Cave, McPheeters & McRoberts, St. Louis, Missouri

(2) Guilfoil, Caruthers, Symington & Montrey, St. Louis, Missouri

(3) Hendren & Andrae, Jefferson City, Missouri
(4) Mark M. Hennelly, Gilbert P. Strelinger and Robert Yost, St. Louis, Missouri
(5) Arnold & Porter, Washington, D. C.
(6) Sullivan & Cromwell, New York City
(7) Leon Leighton, New York City.

The skill and resourcefulness of the attorneys for defendants are well known to this Court.

Lowenthal, et al., affirm that during the three and a half year period of the litigation, an aggregate of about 5,500 hours on approximately 475 separate days, including nights, Saturdays, Sundays, and holidays, was spent on the case, including 32 days in St. Louis or Washington. Applicants state that for services of this nature performed for a regular retainer client on a cash (non-contingent) basis, they would have charged $375,000, but that for the same services rendered on a contingent-fee basis for clients not expected to become regular clients, the applicant attorneys would, if free to negotiate a fee with their clients, base rates not only on the amount of time spent, but also on the amount at stake, and the results achieved in the litigation. In the light of these facts, applicants Lowenthal, et al., submit that the reasonable value of their services in this litigation is greater than the $550,000 which they request as fees, plus the $12,504.85 as reimbursement for expenses incurred in the litigation.

The Court find that the expenses of $12,504.85 are reasonable and will be allowed.

The firms of Pomerantz, Levy, Haudek and Block of New York, and Ackert and Tompkins of St. Louis, together, seek $750,000 in attorneys' fees, plus reimbursement for expenses of $2,799.26 and $43.98 for a total of $2,843.24. The expenses are outlined in a schedule of disbursements, and plaintiff Slayton's share of the cost of printing the

petition for certiorari accounts for nearly one-half of this amount. All of the expenses are reasonable and will be allowed.

Applicants Pomerantz et al., state that the proper criterion for assessing fees in class actions of this nature is benefits achieved. Measured in terms of benefits to the Class B stock, the increase in its market value which applicants attribute to the results of this litigation, totalled $53,800,000; the avoided decrease in its book value was $254,040,014, and the avoided annual earnings loss to the Class B shareholders, based on a price-earnings ratio of 11 (which is the average of all railroads throughout the nation in 1966), was $17,111,347.

Applicants also point out that where the client pays his lawyer, win or lose, he saves because he, not his lawyer, assumes the risk of failure, but that in cases taken on a contingent-fee basis, the lawyer accepts the risk of failure and his success should be compensated accordingly.

Mr. Pomerantz' firm has specialized in this type of corporate litigation for thirty-three years, and has been described as "one of the country's foremost specialists in this type of litigation", Angoff v. Goldfine, supra, at 193. In his affidavit, Pomerantz states that in non-contingent cases of this type, his fee is $115 per hour, Mr. Haudek's fee is $75 per hour, and the time of the firm's associates is billed at $35 per hour. He estimates that a fair allocation of office overhead, secretarial, stenographic, clerical, and other employee activity attributable to this case during the period it was in the office amounted to about $40,000, which is covered by the fee he requests. Mr. Pomerantz and the lawyers associated with him, except for local counsel, kept no record of time spent.

They submitted, however, that in the present case, it would be unfair to assess fees on the basis of *quantum meruit*, because that was not the nature of the bargain.

Appendix A

In support of this argument, Mr. Pomerantz points out that taking the increase in market value of the Class B stock as a measure, the $750,000 fee requested represents less than two per cent of the benefit accruing to the Class B shareholders.

In determining what overall fee plaintiff's attorneys should be allowed in a case of this type, the Court must consider that this involved no trial, no discovery, but was limited to briefs and oral argument before the District Court, briefs and oral argument before the Court of Appeals, briefs and oral argument before the Supreme Court, in addition to the research necessary to prepare the briefs and make the oral argument. It proceeded essentially as one case from start to finish.

It is to be noted that on behalf of plaintiffs, three separate briefs and reply briefs were filed with the District Court and the Court of Appeals; before the Supreme Court, Alleghany's attorneys and Slayton's attorneys joined in the briefs and Levin's attorneys filed separate briefs.

The oral argument before the Supreme Court was conducted by Alleghany's attorneys and Levin's attorneys.

The Court is of the opinion that $175,000 is a reasonable fee for Slayton's attorneys Pomerantz, Levy, Haudek and Block of New York and Ackert and Tompkins of St. Louis, and it will be allowed.

The Court is of the opinion that $175,000 is a reasonable fee for John Lowenthal, the firms of Szold, Brandwen, Meyers and Altman of New York, and Sherin and Lodgen of Boston, and Roberts Elam of St. Louis. This amount will be allowed.

The total of all fees allowed plaintiffs' lawyers is $548,161.00 and the total of expenses is $41,926.18. Considering all the applicable facts and the law, these fees

and expenses are reasonable. The division of these amounts among the three sets of lawyers is also reasonable. Judgment will be renedered in favor of the plaintiffs' lawyers and against MoPac for the foregoing amounts.

Dated this 12th day of January, 1968.

/s/ JAMES H. MEREDITH,
United States District Judge.

APPENDIX B

Opinion of Court of Appeals for the Eight Circuit, Dated March 7, 1969

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 19,250.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,

v.

ROSE SLAYTON, et al.,
Appellees.

No. 19,251.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,

v.

ALLEGHANY CORPORATION, et al.,
Appellees.

No. 19,252.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,

v.

BETTY LEVIN,
Appellee.

No. 19,253.

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant,

v.

JANE HARRIS, et al.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

Appendix B

Before VAN OOSTERHOUT, *Chief Judge;* MEHAFFY and HEANEY, *Circuit Judges.*

VAN OOSTERHOUT, *Chief Judge.*

This is an appeal by Missouri Pacific Railroad Company (Mo-Pac) from final judgment requiring Mo-Pac to pay attorneys' fees of plaintiffs' counsel aggregating $548,-161.00 and $41,926.13 expenses incurred by such attorneys, all in connection with four companion suits identified in the caption hereto, brought by plaintiffs against Mo-Pac and others as a class action on behalf of named plaintiffs and all Class B stockholders of Mo-Pac for declaratory judgment.

The ultimate issue in controversy in the declaratory judgment action was whether Mo-Pac's Class A and Class B common stockholders were entitled to vote separately on a plan of consolidation entered into between Mo-Pac and Texas and Pacific Railway Company which was submitted to the Interstate Commerce Commission for order of approval pursuant to 49 U.S.C.A. § 5. Mo-Pac stated therein that under 49 U.S.C.A. § 5(11), the plan would be submitted to its Class A and Class B stockholders for a collective vote. Mo-Pac had previously announced that the Class B stockholders were not entitled to vote separately on the consolidation plan. At the time of the consolidation proceeding, Mo-Pac had outstanding 1,856,277 shares of Class A stock and 39,731 shares of Class B stock. Each Class A share is entitled to a noncumulative dividend not in excess of $5 per share and to $100 upon liquidation. Upon dissolution Class B is entitled to ratably share in all assets remaining after payment of amount due on the Class A stock. The Class B shares are entitled to such dividends as may be declared by the direc-

tors without restriction as to amount. Upon the basis of the net asset value shown by the books of Mo-Pac as of September 30, 1966, the equity of the Class A stock was $100 per share while that of Class B stock was $5280 per share. The provisions relating to the two classes of stock emerged as a result of the approval of the Mo-Pac reorganization under § 77 of the Bankruptcy Act. See *Mississippi River Fuel Corp.* v. *Slayton,* 8 Cir., 359 F.2d 106, 108.

Mississippi River Fuel owned over 50% of the Class A stock; Alleghany owned slightly over 50% of the Class B stock.

The nature and history of the declaratory judgment action is fully set out in the opinion of the District Court granting the declaratory relief prayed, (*Slayton* v. *Missouri Pacific R.R.,* 233 F.Supp. 747), our reversing opinion, (*Mississippi River Fuel Corp.* v. *Slayton,* 8 Cir., 359 F.2d 106), and the opinion of the Supreme Court reversing our judgment and remanding the case to the District Court for further proceedings consistent with its opinion (*Levin* v. *Mississippi River Fuel Corp.,* 386 U.S. 162).

The voting rights issue presented by the declaratory judgment action was resolved by the Supreme Court as follows: "With reference to voting rights, we hold that in a consolidation as proposed here, Missouri law must be applied and that § 351.270 of that law requires the application of the Articles of Association of MoPac, which in turn, require the assent of the majority of the shareholders on a separate class-vote basis." 386 U.S. 162, 170.

In April 1967 the Interstate Commerce Commission at the request of the railroad applicants dismissed the application for consolidation. On June 30, 1967, after receipt of the Supreme Court mandate, the trial court entered an order determining that the actions in these cases had been properly maintained as class actions and adjudging that

the proposed plan of consolidation could not be approved or adopted by Mo-Pac without the consent of a majority of the shares of each class of stock. Thereafter, on July 31, after appropriate notice had been given to all Mo-Pac stockholders and an opportunity had been afforded to be heard, the court ordered that the four cases here involved be dismissed without prejudice, except with respect to the voting rights issue previously adjudicated, with the reservation of the jurisdiction to determine what if any attorneys' fees and expense disbursements should be allowed plaintiffs or their attorneys against any of the defendants. Attorneys claiming fees were directed to file verified claims therefor with supporting briefs and defendants were authorized to file briefs in resistance, and provision was made for an evidentiary hearing. Applications for attorneys' fees were filed by attorneys for each of the plaintiffs, and an evidentiary hearing was held. The court allowed attorneys' fees and expense reimbursement in the amounts previously indicated and entered judgment for such items. The basis for the judgment is set out in the court's memorandum opinion, *Slayton* v. *Missouri Pacific R.R.*, 279 F. Supp. 525.

The basic questions raised by the appeal attacking such judgment are:

> (1) Under the facts of this case, did the District Court abuse its discretion or not in assessing attorneys' fees and expenses incurred in the declaratory judgment action against Mo-Pac?
>
> (2) If not, are the amounts allowed reasonable, particularly in light of the alleged duplication of effort on the part of counsel for the various plaintiffs?

The trial court in its opinion based its allowance of fees and expenses on two findings, both of which Mo-Pac claim

are erroneous. The first finding is to the effect that Mo-Pac benefited from the final determination of the voting rights issue by the Supreme Court. There is no value placed upon such benefit nor is such benefit weighed against the benefit derived by the Class B shareholders as a result of the litigation.

In a broad sense, it may be said that the final adjudication of any litigation in which a party has an interest is a benefit to him in that he then knows what his legal position is. As a result of the declaratory judgment, Mo-Pac was authoritatively advised that in a railroad consolidation proceedings such as the one it had instituted, separate majority consent must be obtained from its Class A stockholders and its Class B stockholders.

The parties primarily interested in the voting rights issue are the Class A and Class B stockholders. The interests of each in upholding their conflicting claims is substantial. Mo-Pac was required in connection with the submission of the consolidation plan to the Interstate Commerce Commission to make the initial determination on the voting rights issue. It seems entirely clear upon the record before us that the controversy in litigation over voting rights would develop which ever way Mo-Pac made the initial decision on the issue. Mr. Lowenthal conceded in his oral argument on behalf of the plaintiffs that if Mo-Pac had brought a declaratory judgment action to determine voting rights, there would have been appearances or interventions by the same parties, to wit, the A and B stockholders.

Forty-nine U.S.C.A. § 5(11) requires inter alia assent to a consolidation plan by the majority of the votes of the holders of stock entitled to vote "unless a different vote is required under applicable State law, in which case the number so required shall assent." Thus, absent the declaratory judgment action, the responsibility for deter-

mining whether proper stockholder consent has been given is placed on the Commission in the first instance with review by the courts.

It is undisputed that the Class B stockholders obtained a very substantial benefit from the litigation they instituted and won. By obtaining the separate voting rights, they were able to defeat the consolidation plan which was disadvantageous to the Class B stockholders. The trial court found that the merger as proposed would have taken an equity value of $200,000,000 from B stockholders and given it to the A stockholders. We in our opinion and the Supreme Court in its opinion both pointed to the fact that the issue of the reasonableness of the plan was not before the court in the declaratory judgment action since the merits of the plan under the Act are the concern of the Commission in the first instance. Nevertheless, the record before us shows that the market value of a Class B share had dropped from a value of $1392 just prior to our decision to $530 just prior to the Supreme Court's granting of certiorari, and that after the decision of the Supreme Court on February 27, 1967, the market value rose to $1875 per share on March 10, 1967. All the plaintiffs named as litigants possessed substantial Class B stock interests. The Pomerantz affidavit in support of the fee claim alleges that based on salvaged market value Alleghany has been benefited in this action in the amount of $26,900,000.00; the intervening plaintiffs in Slayton have benefited in salvaged market value by $336,000.00 and the Harris, Stutch and Levin plaintiffs have been benefited through salavaged market value in the amount of $564,900.00. Based upon the Pomerantz figures for salvaged book value, the Alleghany Corporation has been benefited $127,880,000.00, the Slayton intervening plaintiffs have been benefited $1,598,500.00 and the Harris, Stuch and Levin plaintiffs have been benefited $2,685,480.00.

Appendix B

There can under the record in this case be no doubt that the declaratory judgment actions were instituted primarily for the purpose of establishing separate voting rights and that the actions were instituted primarily for the purpose of obtaining such rights for the Class B stockholders. The benefits obtained for the Class B stockholders from the litigation far outweigh any indirect benefit Mo-Pac may have derived as a result of having the class voting rights adjudicated.

It would be difficult to place a momentary value on the worth to the corporation of the adjudication of the voting rights issue. No effort was made to do so. Mo-Pac was one of the parties defendant in the litigation and it appeared and defended. Nothing appears in the record that would indicate that anything in the way of diminution of litigation costs would be brought about by plaintiffs bringing the declaratory judgment litigation rather than having such litigation commenced by Mo-Pac or by having it resolved in the Interstate Commerce Commission proceedings. It would be reasonable to suppose that the Interstate Commerce Commission would reach the consent issue early in the proceedings. There is no evidence in the record as to what expense Mo-Pac incurred for its representation by counsel in plaintiffs' suits and it would be entirely speculative to say that the benefit Mo-Pac received from the litigation exceeds the expense it has incurred in connection with the litigation.

In the second finding upon which the decision is based, the court determined that the inherent unfairness of the plan is a sufficient reason to award attorneys' fees to the plaintiffs. We find no merit to such ground. As we have previously observed, the fairness of the plan was not at issue or adjudicated in the declaratory judgment proceedings. The trial court recognized this to be true.

Appendix B

Some of the plaintiffs in their petitions alleged fraud and inequitable conduct upon the part of Mo-Pac and its directors and officers and some of the pleadings were aimed at obtaining derivative relief by reason thereof. Such issues were dismissed by the court with the consent of the plaintiffs and were never adjudicated. The trial court recognized this to be the fact in its refusal to award fees against the individual directors of Mo-Pac and against Mississippi River Fuel Corporation, holder of a majority of the Class A stock.

We observe that the issue of the right of the named plaintiffs and their attorneys to make a pro rata recovery of fees and expenses against Class B stockholders, who were members of the class on whose behalf the litigation was prosecuted and who benefited from the litigation, is not directly before us in this case. Relief here is sought only against Mo-Pac, certain directors and Mississippi River Fuel Corporation. It is elementary that a corporation is an entity separate and distinct from its stockholders and that earnings of a corporation remain the property of the corporation until severed and distributed as dividends and that a corporation cannot be required to pay obligations which are not its own but those of some of its stockholders. See *Hayes* v. *St. Louis Union Trust Co.*, Mo., 298 S.W. 91, 97; *Klein* v. *Board of Supervisors*, 282 U.S. 19, 24.

In our view, the recent case of *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, controls the issue here. While that case involved a rejection of attorneys' fees for the successful prosecution of a suit for deliberate infringement of a Lanham Act trademark, Chief Justice Warren, in the opinion reviewing the underlying principles involved in allowing attorneys' fees to a successful litigant, points out that English courts have allowed attorneys' fees to successful litigants rather freely but that American courts have generally resisted such a movement in

that direction. He then states, "The rule here has long been that attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." 386 U.S. 714, 717. Two reasons are stated in support of the rule, to wit, (1) litigation is at best uncertain and one should not be penalized for merely prosecuting or defending a lawsuit, and (2) the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration.

No statutory or contractual provision for attorneys' fees is present in the case before us. The reasons set out by the Chief Justice for not adopting the English practice fully apply to our present situation.

Our opinion on the voting rights issue demonstrated that we found the issue to be complex and difficult. There is nothing in the Supreme Court's reversing opinion to indicate that the issue lacks substance. The extensive time spent in briefing by plaintiffs' skilled and competent counsel reflects that they found the issue to be troublesome. The long record in support of the fee claim also supports the view that determination of fees puts a substantial burden upon judicial administration.

As the trial court observes, Fleischmann concedes that some exceptions have been made to the general rule. We note that the Court describes the exceptions as limited exceptions. None of the exceptions recognized in *Fleischmann* approaches our present situation.

Some of plaintiffs' briefs argue that the corporate assets constitute a fund. While Mo-Pac doubtless has funds in its possession, the corporate funds in our present situation have not been enhanced or increased by plaintiffs' action nor has plaintiffs' action in any substantial manner preserved funds that would otherwise be lost to

the corporation. In such respect, the situation here differs from that in *Jesser* v. *Mayfair Hotel, Inc.*, Mo., 360 S.W. 2d 652. In *Jesser* the court among other things found: "[C]orporate shares had a value substantially in excess of either offer which excess would have been lost to the trust estate and ultimately to some or all of the certificate holders if the proposed sale had gone unchallenged." 360 S.W.2d 652, 661. Thus it would appear in *Jesser* assets of the estate were preserved which would have been lost in the absence of plaintiffs' action. Additionally the court in *Jesser* found that the Mayfair Hotel had agreed to reimburse the trustees for expenses incurred in operating the trust and that the litigation expense incurred was properly charged to the trust.

As we read *Fleischmann,* exceptions to the general rule are sparingly granted. The factual situation here does not fall within any exceptions recognized by *Fleischmann.* In *Sprague* v. *Ticonic Bank,* 307 U.S. 161, 167, the Court with respect to allowance of attorneys' fees in the absence of statutory or contractual provisions states: "[S]uch allowances are appropriate only in exceptional cases and for dominating reasons of justice." The facts before us do not meet such standard.

As heretofore pointed out, all that was actually litigated in the cases here involved was the complex issue of voting rights. The issue of fairness of the consolidation plan was clearly not decided in the litigation for which fees are here sought. The litigated voting rights issue was of primary importance to both the Class A and the Class B stockholders. Any benefit flowing to the corporation as a result of the litigation was incidental and the inescapable result of the litigation. No new fund was created for the corporation nor were any assets of the corporation preserved.

Appendix B

The benefit to the Class B stockholders resulting from the legal victory were substantial. No unreasonable burden will be placed on the plaintiffs by their obligation to pay reasonable fees to counsel whom they employed. In fact, Alleghany has already paid or arranged to pay its attorneys for the work they have done.

It is our view that allowance of fees against the corporation would go well beyond the great weight of existing authority.

We hold that no reasonable basis exists on the record before us for the allowance against Mo-Pac of attorneys' fees and expenses incurred by the plaintiffs in the litigation here involved.

The judgment is reversed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.